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YONG CHOO KIONG v. PP

FEDERAL COURT, PUTRAJAYA
WAN AHMAD FARID WAN SALLEH FCJ
NORDIN HASSAN FCJ
HANIPAH FARIKULLAH FCJ
B [CRIMINAL APPEAL NO: 05(L)-30-03-2024(A)]
7 OCTOBER 2025

Abstract – *(i) The court has a discretion to invoke s. 265A of the Criminal Procedure Code ('CPC') to allow a witness to give their evidence anonymously. It is a provision that applies to any prosecution witness in a criminal trial who wishes to be protected by not disclosing his or her identity. It is not discriminatory in nature, and is therefore valid and constitutional; (ii) A trial judge could not be said to have failed to consider an accused's s. 112 statement, when its main contents had been regurgitated in the accused's oral evidence presented before the court. When the court has considered an accused's defence made orally at the close of a trial, the court had considered all the evidence adduced before it; (iii) In a sexual offence case, corroborating evidence supporting the evidence of a victim will enhance the credibility of the victim and assist in the establishment of the prosecution's case beyond a reasonable doubt. In a case where there are concurrent findings that the victim's evidence is credible, the conviction of the accused is safe as the elements of the charge under s. 376(1) of the Penal Code has been proven.*

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CRIMINAL PROCEDURE: *Penal Code – Section 376(1) – Rape – Conviction and sentence – Appeal against – Defence – Statement – Failure to consider accused's statement under s. 112 of Criminal Procedure Code ('CPC') – Whether fatal to prosecution's case – Whether s. 182A of CPC breached – Whether defence of accused afterthought – Whether raised reasonable doubt – Whether there was miscarriage of justice – Whether conviction of accused safe*

CRIMINAL PROCEDURE: *Penal Code – Section 376(1) – Rape – Conviction and sentence – Appeal against – Credibility of victim – Victim's conduct and demeanour tested against totality of corroborative evidence – Consideration of circumstantial evidence in entirety – Whether contradictions raised affected credibility of victim – Whether conviction of accused safe*

CRIMINAL PROCEDURE: *Witness – Anonymous evidence – Accused charged for offence of rape of domestic helper – Witnesses allowed to testify anonymously – Whether procedure under s. 265A of Criminal Procedure Code ('CPC') complied with – Whether there was miscarriage of justice or prejudicial effect – Whether s. 265A(2) and (3) of CPC valid and constitutional – Whether arts. 5(1) and 8(1) of Federal Constitution breached – Witness Protection Act 2009, s. 20(1)(a) & (b)*

EVIDENCE: *Corroborative evidence – Sexual offence case – Whether corroborative evidence could assist in establishment of prosecution's case beyond reasonable doubt – Admission of forensic and medical evidence – Consideration of circumstantial evidence in entirety – Whether could lead to reasonable inference that offence of rape occurred – Whether conviction of accused safe*

EVIDENCE: *Additional evidence – Admission of – Whether amounted to documentary hearsay – Whether prerequisites of s. 32(1)(c) of Evidence Act 1950 fulfilled*

This was the appellant's appeal against the majority decision of the Court of Appeal in affirming the decision of the trial judge that convicted the appellant for an offence of rape under s. 376(1) of the Penal Code ('PC'). The prosecution established its case on the evidence of its main witness, the victim ('PW15') and other corroborative evidence, among others by PW3, PW5, PW16, PW15's diary ('P20A') and the CCTV evidence. The trial judge, after conducting an inquiry, was satisfied that there was a need to protect the identities of PW15 and PW16 and as such, allowed their applications under s. 265A of the Criminal Procedure Code ('CPC') and s. 20(1)(a) and (b) of the Witness Protection Act 2009 ('WPA'). The main witness, PW15, an Indonesian national, testified in court that on 8 May 2019, she was employed as a maid at the appellant's house. During the period of her employment, PW15 was sexually harassed by the appellant three times before the rape incident. On 7 July 2019, at about 8pm, whilst PW15 was ironing clothes in the appellant's son's room, the appellant entered the room and thereafter closed the wooden blinds. The appellant then pulled PW15's hand and moved towards the bed. PW15 resisted the appellant's action and said 'lepaslah', but the appellant responded 'teriaklah, tiada siapa yang dengar', and PW15 was pushed onto the bed by the appellant. The appellant then placed his body on top of PW15 while PW15 tried to push the appellant away but failed. Her attempt to escape was also unsuccessful. While PW15 was lying on the bed, the appellant held both of PW15's hands with his left hand and placed them on her head. The appellant then, using his right hand, took off PW15's pants and panties and inserted his penis into PW15's vagina for about two to three minutes. After a while, PW15 managed to push the appellant's body and ran to the bathroom, but was followed by the appellant, who then fondled her. PW15 then pushed the appellant out of the bathroom and locked the door. PW15 heard the appellant knock several times on the bathroom door, but PW15 refused to open it. After the knocking on the door stopped, PW15 stayed quietly in the toilet to calm herself and then washed her private parts. PW15 thereafter went out of the bathroom to continue with her work. PW15 did not sleep that night but cried and wrote in her personal diary. (P20A). A day after the incident, on 8 July 2025, PW15 made three telephone calls to PW3, an employee with 'Bahagian Tenaga Kerja KBRI', informing him about the

A incident that she was raped by her employer. PW3 testified that during the telephone conversations, PW15, in a state of panic, cried and asked to be saved several times. PW3 then requested her to go to the nearest police station. On the same day, at about 1.15pm, PW15 stopped a car driven by PW16 and requested him to send her to the Indonesian Embassy in Kuala
B Lumpur. PW15 then informed him that she had been raped by her employer and started crying. Hearing this, PW16 brought PW15 to the Jelapang Police Station for PW15 to lodge a police report, which she did. In her police report ('P52'), PW15 mentioned that on 7 July 2019, she was raped by the appellant in the appellant's house at about 9pm. Two days after the incident,
C on 9 July 2019, PW15 was examined by PW5 at the hospital, where PW5 found there were fresh tears of the hymen that occurred less than 72 hours from the time of the examination. PW5 did not rule out that the fresh tears could be caused by penile penetration. The CCTV evidence presented by the prosecution also showed that the appellant was alone with PW15 in the house at the time of the incident. The trial judge, having considered the
D evidence adduced by PW15 and her demeanour in court and the totality of the prosecution evidence, found that PW15 was a credible witness and her evidence convincing. The trial judge also found that the prosecution had proved all the elements of the offence of rape against the appellant, which were penile penetration and the absence of PW15's consent. Hence, the trial
E judge concluded that the prosecution had succeeded in proving a *prima facie* case for the offence of rape under s. 376(1) of the PC against the appellant. The appellant, in his defence under oath, essentially denied raping PW15 and asserted that PW15 had invented the story that the appellant raped her merely to enable her to return home to Indonesia before the expiry of her
F contract of service. The appellant also believed that there was a political ploy against him. The trial judge, however, found that the defence had failed to raise any reasonable doubt on the prosecution's case. Therefore, the appellant was convicted of the offence of rape as charged and was sentenced to 13 years of imprisonment and two strokes of whipping. The Court of
G Appeal affirmed the decision of the trial judge in convicting the appellant of the rape charge, but reduced the sentence to eight years of imprisonment, maintaining the two strokes of whipping. Hence, this appeal. The issues that were raised were, *inter alia* (i) whether the invocation of the procedures under s. 265A(2) and (3) of the CPC by the trial judge for witnesses PW15 and PW16 was invalid and the provision unconstitutional; (ii) whether the trial
H judge and the Court of Appeal failed to comply with s. 182A of the CPC when they failed to consider the appellant's statement under s. 112 of the CPC (D107) ('s. 112 statement') in their decisions; and (iii) whether the trial judge and the Court of Appeal erred in finding that the evidence of PW15 was credible and that the evidence was corroborated and in failing to
I consider the appellant's defence.

Held (dismissing appeal)
Per Nordin Hassan FCJ delivering the judgment of the court:

(1a) Section 265A of the CPC is a special provision enacted by Parliament for the purpose of protecting prosecution witnesses and encouraging witnesses to testify in court. Any witness for the prosecution who refuses to have his identity disclosed and wishes to testify in a manner that he would not be seen or heard by the accused and his counsel may make an application to the court under s. 265(1) through the Public Prosecutor. Section 265A of the CPC is unambiguous in that the granting of the said application was not a matter of right of the witness. The court shall conduct an inquiry to determine whether the identity of the witnesses need to be protected. Upon the satisfaction of the court, only then the application may be granted as provided under s. 265A(2) and (3). Further, when a witness gives evidence in accordance with this section, he, for the purpose of the CPC and the Evident Act 1950 ('EA'), is seemed to be giving evidence in the presence of the court, the accused and his counsel as provided under s. 265A. (paras 23 & 25)

(1b) The procedure under s. 265A of the CPC had been strictly complied with by the trial judge. Upon an inquiry held, the trial judge was satisfied that there was a need for the identity of both PW15 and PW16 not to be disclosed and their evidence to be taken in the manner as prescribed therein. As such, the applications by PW15 and PW16 were granted under s. 265A of the CPC and also s. 20(1)(a) and (b) of the WPA. (paras 26-30)

(2) Section 265A of the CPC, in particular s. 265A(2) and (3), was validly passed by Parliament with plain and unambiguous provisions that authorise the absence of the accused and his counsel at the inquiry stage. Therefore, it was valid and constitutional. Section 265A of the CPC applies to any prosecution's witnesses in a criminal trial who wish to be protected by not disclosing their identity. There is no element of discrimination in the application of the provision. Hence, as this provision is available to any prosecution's witnesses in a criminal trial, it is not discriminatory in nature and does not infringe art. 8(1) of the Federal Constitution ('FC'). The inquiry process by the trial judge does not affect the rights of an accused person to defend himself, nor touches on his guilt. The evidence of PW15 and PW16 was also presented to the defence, and these witnesses were also subjected to cross-examination by the defence. There was no miscarriage of justice or prejudicial effect to the appellant. All the steps taken in the present case were in accordance with the law, and arts. 5(1) and 8(1) of the FC have not been breached. Section 265A(2) and (3) of the CPC was found to be a good law, valid, and constitutional. (paras 46-49)

(3a) Section 182A(1) of the CPC requires the court to consider all the evidence adduced before it at the close of a trial in deciding whether the prosecution has proved its case beyond a reasonable doubt. In the appellant's s. 112 statement ('D107'), the appellant's defence was essentially that the appellant did not rape PW15, and PW15 invented the story as an excuse to return home to Indonesia. Further, in D107, he stated that this could be a political ploy. Here, it was not disputed that the main contents of D107 were regurgitated in the appellant's oral evidence when he presented his defence before the court. Hence, when the court considered his defence made orally at the close of the trial, the court had considered all the evidence adduced before it. It was not the submission of the defence that the contents of D107 were different from the appellant's oral evidence in court. Therefore, there was no breach of s. 182A in the present case. (para 52)

(3b) The appellant's defence in D107 was an exculpatory or self-serving statement, which, in itself, was not evidence of facts. The evidence of facts was the oral evidence of the appellant in court, which had been tested by cross-examination. Thus, what was pertinent for the court to consider was the appellant's evidence in court as his defence, which was tested in cross-examination and in the light of the totality of evidence. After all, the substance of the appellant's s. 112 statement (D107) was similar to his oral evidence in court. Hence, there was no miscarriage of justice or prejudicial effect to the appellant in the circumstances. The requirement of s. 182A of the CPC had been complied with, and the omission to refer to the appellant's s. 112 statement (D107) by the court was not fatal to the prosecution's case. (paras 53 & 56)

(4) PW15's conduct had to be analysed in the context of the totality of evidence. Firstly, PW15 testified that earlier, she had been warned by the appellant that PW15 must not inform the appellant's wife (DW2) about his misconduct against PW15, or if not, they would die and PW15 would die first. Further, PW15's conduct when she telephoned PW3 thrice in a state of panic and crying, informing him about the rape incidents, and crying when informing PW16 before lodging the police report, supported the conduct of a rape victim. The forensic evidence by PW5 also showed fresh tears of her hymen that were consistent with PW15's story of being raped. The trial judge found that PW15 was a credible witness based on the assessment of her demeanour, her conduct and tested it against the totality of corroborative evidence before the court. There were also concurrent findings on the credibility of PW15 by the trial judge and the Court of Appeal. Further, the contradictions of PW15's evidence or her conduct raised by the defence were not material that affected PW15's credibility. As such, there was no reason for this court to disturb the said findings. (paras 64 & 67)

(5a) In a sexual offence case, such as a rape offence, although there is no legal requirement for corroborating evidence, it is prudent to have corroborative evidence supporting the evidence of the victim. The corroboration will enhance the credibility of the victim and assist in the establishment of the prosecution's case beyond a reasonable doubt. In the present case, besides the concurrent findings that PW15's evidence was credible, there was ample corroborative evidence supporting PW15's evidence. The evidence of PW3, who received three phone calls from PW15 during which she was panicked and crying, and informed him that she had been raped, the evidence of PW16, who saw PW15 waving and running after PW16's car, and later cried when she informed him that she had been raped, and the evidence of DW3 that PW15 while crying informed him that there was 'bad people' at her work place, were evidence of distress that corroborated PW15's evidence. PW15 had lodged a police report ('P52') on 8 July 2019, and the substance of the report was that she was raped by the appellant on 7 July 2019. Exhibit P52 was PW15's former statement made to the police, an authority legally competent to investigate the facts. It had a corroborative nature in light of other evidence adduced. (paras 77 & 84)

(5b) In PW15's personal diary (P20A), PW15, among others, wrote 'Aku benci diriku' (I hate myself) and when asked in court what she meant by these words, PW15 said that she feels 'kotor, jijik dan hina' (dirty, disgusting and humiliated). This was also evidence of distress that corroborated PW15's evidence, and P20A was her former statement that was consistent with the feelings of a rape victim. There was also the evidence from the CCTV presented by the prosecution, showing that at the material time when the incident happened, the appellant's wife (SD2) and their son went out to McDonalds, and the appellant's friend PW22 had left the house earlier than SD2. Thus, the appellant was alone in the house with PW15, and this provided the opportunity for the appellant to commit the offence. Evidence of opportunity *per se* could not amount to corroboration of PW15, but with other circumstantial evidence, it would lead to a reasonable inference that the offence had happened as testified by PW15. (paras 89-91)

(5c) There was also admissible medical evidence of PW5 that corroborated the evidence of the offence of rape against PW15. PW5 had examined PW15 at Ipoh General Hospital and found that there were fresh tears at the hymen and also abrasions which occurred less than 72 hours from the time of the examination. PW5 also did not rule out that the tears could be caused by penile penetration. This piece of medical evidence corroborated the evidence of PW15 that she was raped two days before the medical examination by PW5. PW15's evidence was sufficiently corroborated by other evidence. (paras 90-95)

(6) The appellant's defence had been sufficiently considered by the trial judge and the Court of Appeal. The trial judge had also ruled out that PW15 invented the story to enable her to return to Indonesia, or the existence of a political ploy. Thereafter, the trial judge concluded that the appellant's defence was an afterthought and failed to raise a reasonable doubt on the prosecution's case. The Court of Appeal had also assessed the defence's case and concluded that the conviction by the trial judge was safe and as such, affirmed the conviction. On the same issue, there were concurrent findings of the trial judge and the Court of Appeal that the appellant had failed in his defence to raise a reasonable doubt on the prosecution's case. The appellant's defence, which included the appellant's testimony and that of other defence witnesses, did not raise a reasonable doubt as to the truth of the prosecution's evidence or the appellant's guilt. (paras 96-99)

(7a) On the issue of the admission of additional evidence, the defence called an Indonesian lawyer, Pathurrahman, who testified that PW15 had come to his office for legal advice. Pathurrahman prepared a written statement, which exhibited, among others, a letter of authorisation by PW15 to Pathurrahman ('SDT1(D)'). In the letter of statement, PW15 purportedly stated, in substance, that her evidence in the trial against the appellant, that she was raped by the appellant, was not true and she made up the story to enable her to return home to Indonesia before the expiry of her contract period. Pathurrahman had no personal knowledge of the rape incident that occurred on 7 July 2019 and thus, his state of mind had no evidential weight that could assist the court other than, if accepted, forwarding an alleged statement made by PW15 for the court's consideration. As the purpose of adducing the additional evidence in the present case was to prove the truth of the contents of the statements, it clearly amounted to documentary hearsay, and the oral evidence of Pathurrahman informing what PW15 had told him was also hearsay evidence, which was inadmissible. (paras 101-106)

(7b) Having perused the evidence of Pathurrahman, the written statements ('SDT1'), and other related documents, there was nothing to establish the fact that PW15 refused to come to Malaysia to retract her evidence for the reason that she would be exposed to criminal prosecution. Pathurrahman, being a lawyer, could easily advise her on this, and to put the said reason in writing, if it was the true reason she refused to come to Malaysia. Pathurrahman, in his oral evidence, did not say anything about PW15 being afraid of being exposed to criminal prosecution in Malaysia for her conduct in retracting her evidence in the rape trial. Pathurrahman was also not asked by the defence on this pertinent reason when he testified in court before the trial judge in Malaysia. In the circumstances, the prerequisites of s. 32(1)(c) of the EA have not been strictly proved. (para 111)

(7c) Having considered the oral evidence and the documentary evidence adduced to support the admission of the additional evidence, the trial judge made a finding of fact that the contents of the statement (SDT1) were not credible on the following grounds: (i) in SDT1, it stated that PW15 had worked with the appellant from 7 May 2019 until May 2021, which was about two years. However, based on the oral and documentary evidence presented during the rape trial against the appellant, it was proven that PW15 only worked with the appellant for two months, that was from 8 May 2019 until 7 July 2019; and (ii) the alleged signature of PW15 on SDT1 and SDT1(D) compared with her signature on the documents tendered in court during the rape trial showed a striking difference. As such, the trial judge made a finding of the possibility that the signature on SDT1 and SDT1(D) were not the signatures of PW15. This court agreed with the finding of the trial judge in not accepting the additional evidence, SDT1 and SDT1(D) on the grounds of hearsay, not credible, and not having fulfilled the requirement of s. 32(1) of the EA for its admission as evidence. The conviction against the appellant was safe. (paras 113-115)

Bahasa Melayu *Headnotes*

Ini adalah rayuan perayu terhadap keputusan majoriti Mahkamah Rayuan yang mengesahkan keputusan hakim perbicaraan yang mengisytiharkan perayu bersalah atas kesalahan rogol bawah s. 376(1) Kanun Keseksaan ('KS'). Pihak pendakwaan membuktikan kesnya melalui keterangan saksi utama, mangsa ('PW15') dan keterangan-keterangan sokongan lain, antaranya oleh PW3, PW5, PW16, diari PW15 ('P20A') dan rakaman CCTV. Hakim perbicaraan, selepas menjalankan siasatan, berpuas hati bahawa terdapat keperluan untuk melindungi identiti PW15 dan PW16 dan dengan itu, membenarkan permohonan mereka bawah s. 265A Kanun Tatacara Jenayah ('KTJ') dan s. 20(1)(a) dan (b) Akta Perlindungan Saksi 2009 ('APS'). Saksi utama, PW15, seorang warganegara Indonesia, memberi keterangan di mahkamah bahawa pada 8 Mei 2019, beliau bekerja sebagai pembantu rumah di rumah perayu. Sepanjang tempoh bekerja, PW15 telah diganggu secara seksual oleh perayu sebanyak tiga kali sebelum kejadian rogol. Pada 7 Julai 2019, kira-kira jam 8 malam, semasa PW15 sedang menggosok pakaian di bilik anak perayu, perayu masuk ke bilik itu dan menutup tirai kayu. Perayu kemudian menarik tangan PW15 dan bergerak ke arah katil. PW15 menolak tindakan perayu dan berkata 'lepaslah', tetapi perayu menjawab 'teriaklah, tiada siapa yang dengar', lalu PW15 didorong ke katil oleh perayu. Perayu kemudian meletakkan badannya di atas PW15 sementara PW15 cuba menolak perayu tetapi gagal. Usahanya untuk melarikan diri juga tidak berjaya. Semasa PW15 terbaring di atas katil, perayu menahan kedua-dua tangan PW15 dengan tangan kirinya dan meletakkannya di atas kepala wanita itu. Perayu kemudian, menggunakan tangan kanannya, menanggalkan seluar dan seluar dalam PW15 dan

memasukkan zakarnya ke dalam faraj PW15 selama kira-kira dua hingga tiga minit. Setelah beberapa ketika, PW15 berjaya menolak badan perayu dan berlari ke bilik mandi, tetapi diikuti oleh perayu yang kemudian meraba tubuh badannya. PW15 kemudian menolak perayu keluar daripada bilik mandi dan mengunci pintu. PW15 mendengar perayu mengetuk pintu bilik mandi beberapa kali, tetapi PW15 enggan membukanya. Selepas ketukan itu berhenti, PW15 berdiam diri di dalam tandas untuk menenangkan diri dan kemudian membersihkan alat sulitnya. Selepas itu, PW15 keluar daripada bilik mandi lalu meneruskan kerjanya. PW15 tidak tidur malam itu tetapi menangis dan menulis di dalam diarinya (P20A). Keesokan harinya, pada 8 Julai 2025, PW15 membuat tiga panggilan telefon kepada PW3, seorang pekerja daripada 'Bahagian Tenaga Kerja KBRI', memaklumkan kejadian dia telah dirogol oleh majikannya. PW3 memberi keterangan bahawa semasa perbualan telefon, PW15, dalam keadaan panik, menangis dan memintanya diselamatkan beberapa kali. PW3 kemudian memintanya pergi ke balai polis berhampiran. Pada hari yang sama, 8 Julai 2019, kira-kira jam 1.15 petang, PW15 memberhentikan kereta yang dipandu PW16 dan meminta beliau menghantarnya ke Kedutaan Indonesia di Kuala Lumpur. PW15 kemudian memaklumkan bahawa dia telah dirogol oleh majikannya dan mula menangis. Mendengar ini, PW16 membawa PW15 ke Balai Polis Jelapang untuk PW15 membuat laporan polis. Dalam laporan polisnya ('P52'), PW15 menyebut bahawa pada 7 Julai 2019, dia telah dirogol oleh perayu di rumah perayu kira-kira pada jam 9 malam. Dua hari selepas kejadian, pada 9 Julai 2019, PW15 telah diperiksa oleh PW5 di hospital, di mana PW5 mendapati terdapat koyakan segar selaput dara yang berlaku kurang daripada 72 jam dari masa pemeriksaan. PW5 tidak menolak bahawa koyakan segar boleh disebabkan oleh penembusan zakar. Keterangan CCTV yang dikemukakan oleh pihak pendakwaan juga menunjukkan perayu bersendirian dengan PW15 di dalam rumah ketika kejadian. Hakim bicara, setelah mempertimbangkan keterangan yang dikemukakan PW15 dan sikapnya di mahkamah dan keseluruhan keterangan pihak pendakwaan, mendapati bahawa PW15 adalah saksi yang boleh dipercayai dan keterangannya meyakinkan. Hakim bicara juga mendapati pihak pendakwaan telah membuktikan kesemua elemen kesalahan rogol terhadap perayu, iaitu penembusan zakar dan ketiadaan persetujuan PW15. Lantas, hakim bicara membuat kesimpulan bahawa pihak pendakwaan telah berjaya membuktikan kes *prima facie* untuk kesalahan rogol bawah s. 376(1) KS terhadap perayu. Perayu, dalam pembelaan bersumpahnya, menafikan telah merogol PW15 dan menegaskan bahawa PW15 telah mereka cerita bahawa perayu merogolnya semata-mata untuk membolehkannya pulang ke Indonesia sebelum tamat kontrak perkhidmatannya. Perayu juga percaya bahawa terdapat muslihat politik terhadapnya. Hakim bicara, walaubagaimanapun mendapati pihak pembelaan gagal menimbulkan sebarang keraguan munasabah terhadap kes pihak pendakwaan. Oleh itu, perayu disabitkan dengan kesalahan merogol seperti yang didakwa dan dijatuhkan hukuman

penjara 13 tahun dan dua sebatan. Mahkamah Rayuan mengesahkan sabitan oleh hakim bicara, tetapi mengurangkan hukuman kepada lapan tahun penjara, dan mengekalkan dua sebatan. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan ialah, antara lain: (i) sama ada permohonan prosedur bawah s. 265A(2) dan (3) KTJ oleh hakim bicara untuk saksi-saksi PW15 dan PW16 adalah tidak sah dan peruntukan itu tidak berperlembagaan; (ii) sama ada hakim bicara dan Mahkamah Rayuan gagal mematuhi s. 182A KTJ apabila mereka gagal mempertimbangkan kenyataan perayu bawah s. 112 KTJ (D107) ('pernyataan s. 112') dalam keputusan mereka; dan (iii) sama ada hakim bicara dan Mahkamah Rayuan terkhilaf apabila mendapati keterangan PW15 adalah boleh dipercayai dan keterangan itu telah disahkan dan gagal mempertimbangkan pembelaan perayu.

Diputuskan (menolak rayuan)
Oleh Nordin Hassan HMP menyampaikan penghakiman mahkamah:

(1a) Seksyen 265A KTJ ialah peruntukan khas yang digubal oleh Parlimen untuk melindungi saksi pendakwaan dan menggalakkan saksi memberi keterangan di mahkamah. Mana-mana saksi pihak pendakwaan yang enggan identitinya didedahkan dan ingin memberi keterangan dengan cara yang dia tidak akan dilihat atau didengar oleh tertuduh dan peguamnya boleh membuat permohonan kepada mahkamah bawah s. 265(1) melalui Pendakwa Raya. Seksyen 265A KTJ adalah jelas kerana pemberian permohonan tersebut bukan tentang hak saksi. Mahkamah hendaklah menjalankan siasatan untuk menentukan sama ada identiti saksi perlu dilindungi. Setelah mahkamah berpuas hati, barulah permohonan itu boleh diluluskan seperti yang diperuntukkan bawah s. 265A(2) dan (3). Selanjutnya, jika seorang saksi memberikan keterangan mengikut seksyen ini, dia, bagi maksud KTJ dan Akta Keterangan 1950 ('AK') , seolah-olah telah memberi keterangan di hadapan mahkamah, tertuduh dan peguamnya seperti yang diperuntukkan bawah s. 265A.

(1b) Dalam kes ini, prosedur bawah s. 265A KTJ telah dipatuhi dengan ketat oleh hakim bicara. Selepas siasatan dijalankan, hakim bicara berpuas hati bahawa terdapat keperluan untuk identiti kedua-dua PW15 dan PW16 tidak didedahkan dan keterangan mereka diambil mengikut cara yang ditetapkan. Oleh yang demikian, permohonan oleh PW15 dan PW16 telah dibenarkan bawah s. 265A KTJ dan juga menurut s. 20(1)(a) dan (b) APS 2009.

(2) Seksyen 265A KTJ, khususnya s. 265A(2) dan (3), telah diluluskan secara sah oleh Parlimen dengan peruntukan yang terang dan jelas yang membenarkan ketiadaan tertuduh dan peguamnya di peringkat siasatan. Oleh itu, itu adalah sah dan berperlembagaan. Seksyen 265A KTJ terpakai pada mana-mana saksi pendakwaan dalam perbicaraan

jenayah yang ingin dilindungi dengan tidak mendedahkan identiti mereka. Tiada unsur diskriminasi dalam pemakaian peruntukan tersebut. Oleh itu, memandangkan peruntukan ini tersedia untuk mana-mana saksi pendakwaan dalam perbicaraan jenayah, itu tidak bersifat diskriminasi, dan tidak melanggar per. 8(1) Perlembagaan Persekutuan ('PP'). Proses siasatan oleh hakim bicara tidak menjejaskan hak orang yang dituduh untuk membela diri, mahupun menyentuh kesalahannya. Keterangan PW15 dan PW16 turut dikemukakan pada pihak pembelaan, dan saksi-saksi ini juga tertakluk pada pemeriksaan balas oleh pihak pembelaan. Tiada kecuaian keadilan atau kesan prejudis pada perayu. Semua langkah yang diambil dalam kes ini adalah mengikut undang-undang, dan per. 5(1) dan per. 8(1) PP tidak dilanggar. Seksyen 265A(2) dan (3) KTJ adalah undang-undang yang baik, sah dan berperlembagaan.

(3a) Seksyen 182A(1) menghendaki mahkamah mempertimbangkan semua bukti yang dikemukakan di hadapannya pada penutup perbicaraan dalam membuat keputusan sama ada pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Dalam kenyataan pemohon bawah s. 112 (D107), asas pembelaan pemohon pada dasarnya ialah bahawa pemohon tidak merogol PW15, dan PW15 mereka-reka cerita itu sebagai alasan untuk pulang ke Indonesia. Selain itu, dalam D107 dinyatakan bahawa ini mungkin taktik politik. Di sini, tidak dipertikaikan bahawa kandungan utama D107 telah diulang semula dalam keterangan lisan pemohon ketika dia mengemukakan pembelaannya di hadapan mahkamah. Oleh itu, apabila mahkamah mempertimbangkan pembelaannya yang dibuat secara lisan semasa penutup perbicaraan, mahkamah telah mempertimbangkan semua bukti yang dikemukakan di hadapannya. Bukan hujah pihak pembelaan bahawa kandungan D107 berbeza daripada keterangan lisan pemohon di mahkamah. Oleh yang demikian, tiada pelanggaran s. 182A dalam kes ini.

(3b) Selain itu, pembelaan perayu dalam D107 ialah suatu kenyataan yang memihak pada diri sendiri atau melepaskan diri, yang pada dirinya bukan bukti fakta. Bukti fakta ialah keterangan lisan perayu di mahkamah, yang telah diuji melalui pemeriksaan balas. Oleh itu, yang relevan untuk dipertimbangkan oleh mahkamah ialah keterangan perayu di mahkamah sebagai pembelaannya, yang telah diuji melalui pemeriksaan balas dan dinilai bersama-sama keseluruhan bukti. Tambahan lagi, intipati kenyataan s. 112 perayu (D107) adalah serupa dengan keterangan lisannya di mahkamah. Berikutan itu berlaku kesilapan kehakiman atau kesan prejudis terhadap perayu dalam keadaan tersebut. Keperluan Seksyen 182A KTJ telah dipatuhi, dan pengabaian merujuk pada s. 112 perayu (D107) oleh mahkamah tidak memudaratkan kes pendakwaan.

(4) Tingkah laku PW15 terpaksa dianalisis dalam konteks keseluruhan bukti. Pertama, PW15 memberi keterangan bahawa sebelum ini, dia telah diberi amaran oleh perayu bahawa PW15 tidak boleh memaklumkan pada isteri perayu (DW2) tentang salah lakunya terhadap PW15, atau jika tidak, mereka akan mati dan PW15 akan mati dahulu. Selanjutnya, kelakuan PW15 apabila dia menelefon PW3 tiga kali dalam keadaan panik dan menangis, memaklumkan kepadanya tentang kejadian rogol, dan menangis apabila memaklumkan PW16 sebelum membuat laporan polis, menyokong kelakuan seorang mangsa rogol. Bukti forensik oleh PW5 juga menunjukkan koyakan segar selaput daranya yang konsisten dengan fakta PW15 dirogol. Hakim bicara mendapati PW15 adalah saksi yang boleh dipercayai berdasarkan penilaian sikapnya, kelakuannya dan mengujinya terhadap keseluruhan bukti yang menyokong di hadapan mahkamah. Terdapat juga penemuan serentak tentang kredibiliti PW15 oleh hakim bicara dan Mahkamah Rayuan. Selain itu, percanggahan bukti PW15 atau kelakuannya yang dibangkitkan oleh pihak pembelaan bukanlah bahan yang menjejaskan kredibiliti PW15. Oleh itu, tiada sebab untuk mahkamah ini mengganggu penemuan tersebut.

(5a) Dalam kes kesalahan seksual, seperti kesalahan rogol, walaupun tidak ada keperluan undang-undang untuk bukti yang menyokong, adalah berhemah untuk mempunyai bukti yang menyokong bukti mangsa. Pengesahan itu akan mempertingkatkan kredibiliti mangsa dan membantu dalam penubuhan kes pendakwaan tanpa keraguan munasabah. Dalam kes ini, selain terdapat penemuan serentak bahawa keterangan PW15 adalah boleh dipercayai, terdapat banyak bukti sokongan yang menyokong keterangan PW15. Keterangan PW3, yang menerima tiga panggilan telefon daripada PW15 di mana dia panik dan menangis, dan memaklumkan kepadanya bahawa dia telah dirogol, keterangan PW16, yang melihat PW15 melambai dan berlari mengejar kereta PW16, dan kemudian menangis apabila dia memaklumkan kepadanya bahawa dia telah dirogol, dan keterangan DW3 bahawa PW15 semasa menangis memberitahunya bahawa terdapat 'orang jahat' di tempat kerjanya, terdapat bukti kesusahan yang dialami PW15 yang menyokong keterangan PW15. PW15 telah membuat laporan polis (P52) pada 8 Julai 2019, dan isi laporan itu ialah dia telah dirogol oleh perayu pada 7 Julai 2019. Ekshibit P52 ialah kenyataan PW15 yang dibuat pada polis, iaitu pihak berkuasa yang kompeten di sisi undang-undang untuk menyiasat fakta. Itu mempunyai sifat yang menyokong berdasarkan bukti lain yang dikemukakan.

(5b) Dalam diari peribadi PW15 ('P20A'), PW15, antara lain, menulis 'Aku benci diriku' dan apabila ditanya di mahkamah apa yang dia maksudkan dengan kata-kata ini, PW15 berkata bahawa dia berasa kotor, jijik dan hina. Ini juga adalah bukti kesusahan yang menyokong bukti PW15, dan P20A ialah kenyataan yang konsisten dengan perasaan mangsa rogol. Terdapat juga keterangan CCTV yang dikemukakan oleh pihak pendakwaan, menunjukkan bahawa pada masa material kejadian itu berlaku, isteri perayu (SD2) dan anak lelaki mereka keluar ke McDonalds, dan rakan perayu PW22 meninggalkan rumah lebih awal daripada SD2. Maka, perayu bersendirian di dalam rumah dengan PW15 dan ini memberi peluang pada perayu melakukan kesalahan tersebut. Bukti peluang semata-mata tidak boleh dianggap sebagai pengesahan PW15, tetapi dengan keterangan mengikut keadaan lain, ini akan membawa kepada kesimpulan yang munasabah bahawa kesalahan itu telah berlaku seperti yang disaksikan oleh PW15.

(5c) Terdapat juga bukti perubatan PW5 yang boleh diterima yang menyokong keterangan kesalahan rogol yang dilakukan terhadap PW15. PW5 telah memeriksa PW15 di Hospital Besar Ipoh dan mendapati terdapat koyakan segar pada selaput dara dan juga lecet yang berlaku kurang daripada 72 jam dari masa pemeriksaan. PW5 juga tidak menolak bahawa koyakan itu boleh disebabkan oleh penembusan zakar. Bukti perubatan ini menguatkan keterangan PW15 bahawa dia telah dirogol dua hari sebelum pemeriksaan perubatan oleh PW5. Bukti PW15 cukup disokong oleh bukti lain.

(6) Pembelaan perayu telah dipertimbangkan dengan secukupnya oleh hakim bicara dan Mahkamah Rayuan. Hakim bicara juga telah menolak bahawa PW15 mereka-reka cerita itu untuk membolehkannya kembali ke Indonesia, atau wujudnya muslihat politik. Seterusnya, hakim bicara membuat kesimpulan bahawa pembelaan perayu adalah satu fikiran kemudian dan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Mahkamah Rayuan juga telah menilai kes pembelaan dan membuat kesimpulan bahawa sabitan oleh hakim bicara adalah selamat dan oleh itu, mengesahkan sabitan itu. Tentang isu yang sama, terdapat penemuan serentak hakim bicara dan Mahkamah Rayuan bahawa perayu telah gagal dalam pembelaannya untuk menimbulkan keraguan munasabah terhadap kes pendakwaan. Pembelaan perayu, termasuk keterangan perayu dan saksi pembelaan lain, tidak menimbulkan keraguan munasabah tentang kebenaran keterangan pihak pendakwaan atau kesalahan perayu.

(7a) Tentang isu penerimaan bukti tambahan, pihak pembelaan memanggil peguam Indonesia, Pathurrahman, yang memberi keterangan bahawa PW15 telah datang ke pejabatnya untuk mendapatkan nasihat undang-undang. Pathurrahman menyediakan kenyataan bertulis, yang

mempamerkan, antara lain, surat kebenaran oleh PW15 kepada Pathurrahman ('SDT1(D)'). Dalam surat kenyataan itu, PW15 kononnya menyatakan, pada hakikatnya, keterangannya dalam perbicaraan terhadap perayu, bahawa dia telah dirogol oleh perayu, adalah tidak benar dan dia mereka-reka cerita untuk membolehkannya pulang ke Indonesia sebelum tamat tempoh kontraknya. Pathurrahman tidak mempunyai pengetahuan peribadi tentang insiden rogol yang berlaku pada 7 Julai 2019 dan oleh itu, keadaan fikirannya bukan bukti yang boleh dipercayai dan boleh membantu mahkamah, selain, jika diterima, mengemukakan kenyataan yang didakwa dibuat oleh PW15 untuk pertimbangan mahkamah. Memandangkan tujuan menambah keterangan tambahan dalam kes ini adalah untuk membuktikan kebenaran kandungan kenyataan, itu jelas berjumlah satu dokumentar dengar cakap, dan keterangan lisan Pathurrahman yang memaklumkan apa yang PW15 telah memberitahunya juga adalah keterangan dengar cakap, yang tidak boleh diterima.

(7b) Setelah meneliti keterangan Pathurrahman, kenyataan bertulis ('SDT1'), dan dokumen lain yang berkaitan, tiada apa yang dapat membuktikan fakta bahawa PW15 enggan datang ke Malaysia untuk menarik balik keterangannya atas alasan dia akan didedahkan kepada pendakwaan jenayah. Pathurrahman, sebagai seorang peguam, boleh menasihatinya dengan mudah tentang perkara ini, dan meletakkan alasan tersebut secara bertulis, jika itu sebab sebenar dia enggan datang ke Malaysia. Pathurrahman, dalam keterangan lisannya, tidak berkata apa-apa tentang PW15 takut terdedah kepada pendakwaan jenayah di Malaysia kerana kelakuannya menarik balik keterangannya dalam perbicaraan rogol. Pathurrahman juga tidak ditanya oleh pihak pembelaan atas sebab yang berkaitan ini apabila dia memberi keterangan di mahkamah di hadapan hakim bicara di Malaysia. Dalam keadaan itu, prasyarat s. 32(1)(c) AK belum dibuktikan dengan tegas.

(7c) Setelah mempertimbangkan keterangan lisan dan keterangan dokumentar yang dikemukakan untuk menyokong penerimaan keterangan tambahan, hakim bicara membuat dapatan fakta bahawa kandungan pernyataan (SDT1) tidak boleh dipercayai atas alasan berikut: (i) SDTI menyatakan bahawa PW15 telah bekerja dengan perayu dari Mei 2019 hingga Mei 2021, iaitu kira-kira dua tahun. Walaubagaimanapun, berdasarkan keterangan lisan dan dokumentar yang dikemukakan semasa perbicaraan rogol terhadap perayu, terbukti PW15 hanya bekerja dengan perayu selama dua bulan iaitu dari 8 Mei 2019 hingga 7 Julai 2019; dan (ii) dakwaan tandatangan PW15 pada SDT1 dan SDT1(D) berbanding tandatangannya pada dokumen yang dikemukakan di mahkamah semasa perbicaraan rogol menunjukkan perbezaan yang ketara. Oleh yang demikian, hakim bicara membuat dapatan kemungkinan tandatangan pada SDT1 dan SDT1(D) bukanlah

A tandatangan PW15. Mahkamah ini bersetuju dengan dapatan hakim bicara yang tidak menerima keterangan tambahan, SDT1 dan SDT(D), atas alasan dengar cakap, tidak boleh dipercayai dan tidak memenuhi keperluan s. 32(1) AK untuk pengakuannya sebagai bukti. Sabitan terhadap perayu adalah selamat.

B **Case(s) referred to:**

Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Amathevelli P Ramasamy v. PP [2009] 3 CLJ 109 FC ***(refd)***
Attan Abdul Gani v. PP [1969] CLJU 12; [1969] 1 LNS 12 HC ***(refd)***
Augustine Foong Boo Jang v. PP [1989] CLJU 107; [1989] 1 LNS 107 ***(refd)***
Azhar Lazim v. PP [2012] CLJU 262; [2012] 1 LNS 262 CA ***(refd)***
C *Beh Heng Siong v. PP [1972] CLJU 12; [1972] 1 LNS 12 HC* ***(refd)***
Bird Dominic Jude v. PP [2014] 4 CLJ 133 FC ***(refd)***
Brabakaran v. PP [1965] CLJU 12; [1965] 1 LNS 12 FC ***(refd)***
Din v. PP [1964] CLJU 33; [1964] 1 LNS 33 FC ***(refd)***
DPP v. Kilbourne [1973] 1 All ER 440 ***(refd)***
D *Francis Abuchi Odike v. PP [2015] CLJU 928; [2015] 1 LNS 928 CA* ***(refd)***
Government Of Malaysia & Anor v. Selangor Pilot Association [1977] CLJU 28; [1977] 1 LNS 28 ***(refd)***
Karthiyayani & Anor v. Lee Leong Sin & Anor [1974] CLJU 61; [1974] 1 LNS 61 FC ***(refd)***
Krishna Rao Gurumurthi v. PP & Another Appeal [2009] 2 CLJ 603 FC ***(refd)***
E *Lai Kim Hon & Ors v. PP [1980] 1 CLJU 197; [1980] 1 LNS 197 FC* ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***
Lee Gee Hian v. PP [2021] CLJU 1895; [2021] 1 LNS 1895 CA ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Lim Guan Eng v. PP [2000] 2 CLJ 541 FC ***(refd)***
Lingeswaran Ambalakhan v. PP [2025] CLJU 1473 CA ***(refd)***
F *Loh Kooi Choon v. Government Of Malaysia [1975] CLJU 90; [1975] 1 LNS 90 FC* ***(refd)***
Md Zainuddin Raujan v. PP [2012] 7 CLJ 715 CA ***(refd)***
Mohamed Jamal v. PP [1964] CLJU 235; [1964] 1 LNS 235 ***(refd)***
Myers v. DPP [1964] 2 All ER 881 ***(refd)***
Ng Mee Yee & Anor v. PP [2025] 6 CLJ 343 CA ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ
G *105 FC* ***(refd)***
PP v. Adetunji Adeleye Sule [1993] 3 CLJ 113 SC ***(refd)***
PP v. Chan Kim Choi [1988] CLJU 221; [1988] 1 LNS 221 ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] CLJU 180; [1976] 1 LNS 180 HC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
H *PP v. Pung Chen Choon [1994] CLJU 208; [1994] 1 LNS 208 SC* ***(refd)***
PP v. Samsul Kamar Mohd Zain [1988] 1 CLJ 542; [1988] 2 CLJ (Rep) 310 HC ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
PP v. Yee Kim Seng [1983] 1 CLJ 38; [1983] CLJ (Rep) 824 HC ***(refd)***
R v. Hills [1988] 86 Cr App R 26 ***(refd)***
I *Raten v. R [1972] 1 AC 378* ***(refd)***
Rex v. Velayuthan [1935] CLJU 81; [1935] 1 LNS 81 HC ***(refd)***
Ridley v. Whipp [1916] 22 CLR 381 ***(refd)***
Sabah Forest Industries Sdn Bhd v. UNP Plywood Sdn Bhd [2010] 3 CLJ 779 FC ***(refd)***

Sathya Vello v. PP [2022] 5 CLJ 659 FC ***(refd)***
Sim Tiew Bee v. PP [1973] CLJU 138; [1973] 1 LNS 138 FC ***(refd)***
Subramaniam v. PP [1956] CLJU 115; [1956] 1 LNS 115 ***(refd)***
Tang Kin Seng v. PP [1996] 3 SLR(R) 444 ***(refd)***
Teper v. The Queen [1952] AC 480 ***(refd)***
TN Nathan v. PP [1977] CLJU 127; [1977] 1 LNS 127 HC ***(refd)***
View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***
Yap Ee Kong & Anor v. PP [1980] CLJU 117; [1980] 1 LNS 117 FC ***(refd)***
Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Applications [2021] 1 CLJ 631 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 182A(1), 265(1), 265A(2), (3), (6)
Evidence Act 1950, ss. 32(1)(c), 60, 157
Federal Constitution, arts. 5(1), 8(1)
Immigration Act 1959/63, s. 59
Penal Code, s. 376(1)
Security Offences (Special Measures) Act 2012, ss. 14, 15, 16
Witness Protection Act 2009, s. 20(1)(a), (b)

For the appellant - Hisyam Abdullah, Low Wei Loke, Siti Summaiyah Ahmad Jaafar, Kee Wei Lon & Ee Gen You; M/s Hisyam Teh
Rajpal Singh Mukhtiar Singh & Tiew Poh Nee; M/s Rajpal, Firah & Vishnu
Salim Bashir Bhaskaran; M/s Salim Bashir, Ruswiza & Co
For the respondent - Mohd Amril Johari; DPP

[Editor's note: For the Court of Appeal judgment, please see Yong Choo Kiong v. PP [2024] 5 CLJ 69 (affirmed); For the High Court judgment, please see PP lwn. Yong Choo Kiong [2022] 10 CLJ 103 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Nordin Hassan FCJ:

Introduction

[1] The appellant is appealing against the majority decision of the Court of Appeal in affirming the decision of the trial judge that convicted the appellant for an offence of rape under s. 376(1) of the Penal Code. The High Court, after convicting the appellant, has sentenced him to 13 years' imprisonment and two strokes of whipping. The majority of the Court of Appeal, however, reduced the sentence to eight years' imprisonment and maintained the two strokes of whipping.

[2] The charge against the appellant reads as follows:

> Bahawa kamu pada 7 Julai 2019 di antara jam lebih kurang 8:15 malam hingga 9:15 malam, di dalam sebuah bilik di tingkat atas dalam rumah No.52, Jalan Desa Meru 2, Meru Desa Park, Bandar Meru Jaya, 30020 Ipoh, di dalam daerah Kinta, di dalam negeri Perak telah melakukan rogol

terhadap Awang (No. Pasport: AU 3598249) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 376(1) Kanun Keseksaan.

The Application By PW15 And PW16 For Their Identities Not To Be Disclosed Under Section 265A Of The Criminal Procedure Code (CPC)

[3] Before PW15 and PW16 testified in court, they made an application through the Public Prosecutor for their identities not to be disclosed pursuant to s. 265A of the CPC. The trial judge, after conducting an inquiry on 10 June 2021, was satisfied that there was a need to protect the identities of PW15 and PW16 and, as such, allowed their applications under s. 265A of the CPC and s. 20(1)(a) and (b) of the Witness Protection Act 2009.

The Prosecution Case

[4] The prosecution established its case on the evidence of its main witness, the victim, PW15 (protected witness), and other corroborative evidence, among others, by Riki Sapari (PW3), Dr Nila Wati (PW5), PW16 (protected witness), PW15's diary (P20A), and the CCTV evidence.

[5] The main witness, PW15, an Indonesian national, testified in court that on 8 May 2019, she was employed as a maid at the appellant's house. During the period of his employment, PW15 was sexually harassed by the appellant three times before the rape incident. The appellant also threatened PW15 not to inform his wife (DW2) about his conduct towards PW15, or if not, both of them will die, but PW15 will die first.

[6] On 7 July 2019, at about 8pm, whilst PW15 was ironing clothes in Bryan's room, the appellant's son, the appellant, entered the room and thereafter closed the wooden blind. The appellant then pulled PW15's hand and moved towards the bed. PW15 resisted the appellant's action and said "lepaslah", but the appellant responded "teriaklah, tiada siapa yang dengar", and PW15 was pushed onto the bed by the appellant. The appellant then placed his body on top of PW15 while PW15 tried to push the appellant away but failed. Her attempt to escape was also unsuccessful. While PW15 was lying on the bed, the appellant held both of PW15's hands with his left hand and placed them on her head. The appellant then, using his right hand, took off PW15's pants and panties and inserted his penis into PW15's vagina for about two to three minutes. After a while, PW15 managed to push the appellant's body and ran to the bathroom, but was followed by the appellant, who then fondled her. PW15 then pushed the appellant out of the bathroom and locked the door. PW15 heard the appellant knocked several times on the bathroom door, but PW15 refused to open it. After the knocking on the door stopped, PW15 stayed quietly in the toilet to calm herself and then washed her private parts. PW15 thereafter went out of the bathroom to continue with her work. PW15 did not sleep that night but cried and wrote in her personal diary (P20A).

[7] The next day of the incident, on 8 July 2025, PW15 made three telephone calls to Riki Sapari (PW3), an employee with "Bahagian Tenaga Kerja KBRI", informing him about the incident that she was raped by her employer. PW3 testified that during the telephone conversations, PW15, in a state of panic, cried and asked her to be saved several times. PW3 then requested her to go to the nearest police station.

[8] On the same day, 8 July 2019, at about 1.15pm, PW15 stopped the car driven by PW16 and requested him to send her to the Indonesian Embassy in Kuala Lumpur. PW16, who was unable to send her to Kuala Lumpur, had instead sent her to a taxi stand at Amanjaya, Ipoh. However, PW15 then informed him that she had been raped by her employer and started crying. Hearing this, PW16 brought PW15 to the Jelapang Police Station for PW15 to lodge a police report, which she did. In her police report (P52), PW15 mentioned that on 7 July 2019, she was raped by the appellant in the appellant's house at about 9pm.

[9] PW15 also wrote in her personal diary (P20A), "Aku benci diriku" (I hate myself), and during the trial, when asked why she wrote those words, she answered that she feels "kotor, jijik dan hina" (dirty, disgusting, and humiliated).

[10] Two days after the incident, on 9 July 2019, PW15 was examined by Dr Nila Wati (PW5) at Ipoh General Hospital, where PW5 found there were fresh tears at 6 to 8 o'clock of the hymen that occurred less than 72 hours from the time of the examination. PW5 also did not rule out that the fresh tears could be caused by penile penetration.

[11] The CCTV evidence presented by the prosecution also shows that the appellant was alone with PW15 in the house at the time of the incident.

The Decision Of The Trial Judge At The End Of The Prosecution Case

[12] The trial judge, having considered the evidence adduced by PW15 and her demeanour in court and the totality of the prosecution evidence, found that PW15 is a credible witness and her evidence is convincing. In the grounds of judgment, the judge said this on the assessment of PW15's credibility at the end of the prosecution case:

> [66] Dalam kes ini, mahkamah mendapati SP15 adalah seorang saksi yang kredibel dan keterangannya adalah meyakinkan. Malah keterangannya disokong oleh keterangan pegawai perubatan O&G iaitu SP5 dan juga disokong oleh keterangan saksi-saksi lain termasuk keterangan dokumentar.

[13] The trial judge also found that the prosecution had proved all the elements of the offence of rape against the appellant, which are penile penetration and the absence of PW15's consent. Hence, the trial judge concluded that the prosecution had succeeded in proving a *prima facie* case for the offence of rape under s. 376(1) of the Penal Code against the accused.

[14] The appellant, in his defence under oath, essentially denied raping PW15 and asserted that PW15 had invented the story that the appellant raped her merely to enable her to return home to Indonesia before the expiry of her contract of service. The appellant also believed that there was a political ploy against him.

[15] After analysing the defence case and assessing it in light of the totality of evidence before the court, the trial judge found that the defence had failed to raise any reasonable doubt on the prosecution's case. Therefore, the appellant was convicted of the offence of rape as charged. The appellant was then sentenced to 13 years of imprisonment and two strokes of whipping.

The Proceedings At The Court Of Appeal

[16] The aggrieved appellant then filed an appeal to the Court of Appeal against the decision of the trial judge. The main grounds of the appeal are as follows:

(i) the trial judge erred in invoking s. 265A of the CPC concerning PW15 and PW16;

(ii) the trial judge erred in accepting the evidence of PW15 as credible and corroborated;

(iii) the trial judge failed to direct his mind that the investigations of PW23 were shoddy and incomplete; and

(iv) the trial judge failed to consider the defence of the appellant.

[17] Having analysed the evidence and heard the submissions by parties, the majority of the Court of Appeal held that the grounds for the appeal were without merit and untenable. Therefore, the decision of the trial judge in convicting the appellant of the rape charge was affirmed, however, the sentence was reduced to eight years of imprisonment, and the two strokes of whipping were maintained.

[18] In coming to the decision, the majority of the Court of Appeal accepted the finding of the trial judge that PW15 was a credible witness. In the grounds of judgment, the majority of the Court of Appeal states as follows:

> [22] We are of the considered opinion that the learned trial judge had not erred in his finding that PW15 is a credible witness. There has been a clear finding of facts made by the learned trial judge based on the hearing of the witnesses and considering all the evidence tendered. We are of the view that the learned trial judge is the one who had the audio and visual advantage to observe the demeanour of witnesses. Hence, he was clearly entitled to make findings about the credibility of the witnesses. As an appellate court, we should be slow to interfere with such findings unless it can be shown before us that the findings were perverse and against all available evidence. In the present case, we see no reason to disturb the finding of the trial judge.

[19] It was the finding of the majority of the Court of Appeal that the conviction against the appellant for the offence of rape under s. 376(1) of the Penal Code is safe and, as such, affirmed the conviction by the trial judge.

The Appeal Before This Court

[20] Dissatisfied with the decision of the majority of the Court of Appeal in affirming the conviction by the trial judge against the appellant, the present appeal is before this court. It is a trite law that an appellate court will not interfere with a conviction unless the balance of evidence is grossly against the conviction, and the prosecution's evidence, assessed in the totality of the evidence, has failed to prove the case beyond a reasonable doubt. In other words, the trial judge is plainly wrong in his decision on fact-finding and assessment of evidence. (See also *Lai Kim Hon & Ors v. PP* [1980] CLJU 197; [1980] 1 LNS 197; [1981] 1 MLJ 84).

[21] The issues raised by counsel for the appellant in the present appeal are as follows:

(i) the invocation of the procedures under ss. 265A (2) and (3) of the CPC by the trial judge for witnesses PW15 and PW16 was invalid and the provision is unconstitutional;

(ii) the trial judge and the majority of the Court of Appeal have failed to comply with s. 182A of the CPC when they failed to consider the appellant's statement under s. 112 of the CPC (D107) ('the s. 112 statement') in their decisions;

(iii) the trial judge and the majority of the Court of Appeal erred in finding that the evidence of PW15 was credible;

(iv) the trial judge and the majority of the Court of Appeal also erred in their finding that the evidence of PW15 was corroborated;

(v) the trial judge and the majority of the Court of Appeal also erred when they failed to consider the appellant's defence; and

(vi) the trial judge and the majority of the Court of Appeal also failed to direct their minds that the investigation by PW23 was shoddy and incomplete.

The Invocation Of The Procedures Of ss. 265A(2) And (3) Of The CPC By The Trial Judge For Witnesses PW15 And PW16 Was Invalid, And Whether The Provision Is Unconstitutional

[22] On this issue, counsel for the appellant submitted that the denial of the appellant's right to be heard at the inquiry stage as provided under ss. 265A(2) and (3) of the CPC constitutes a direct violation of the principles of natural justice entrenched under arts. 5 and 8 of the Federal Constitution (FC). Furthermore, the said denial of the appellant's right is oppressive and

unreasonable in nature and intrudes into the fundamental liberty enshrined in the said arts. 5 and 8 of the FC. Moreover, the procedures under ss. 265A(2) and (3) are said to be unduly harsh and unfair to the appellant.

[23] As regards to this issue, s. 265A of the CPC is a special provision enacted by Parliament for the purpose of protecting prosecution witnesses and encouraging witnesses to testify in court. Any witness for the prosecution who refuses to have his identity disclosed and wishes to testify in a manner that he would not be seen or heard by the accused and his counsel may make an application to the court under s. 265(1) through the Public Prosecutor. A similar provision is also provided under ss. 20(a) and (b) of the Witness Protection Act 2009, and ss. 14, 15, and 16 of the Security Offences (Special Measures) Act 2012.

[24] For ease of reference, s. 265A of the CPC is as follows:

> Special provisions relating to protected witness
>
> 265A (1) Notwithstanding section 264, *where at any time during any trial, any of the witnesses for the prosecution refuses to have his identity disclosed and wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the Court for the procedures in this section to apply.*
>
> (2) For the purpose of satisfying itself as to the need to protect the identity of the witness, *the Court shall hold an inquiry in camera by questioning the witnesses concerned or any other witness in the absence of the accused and his counsel.*
>
> (3) *If after such inquiry the Court is satisfied as to the need to protect the identity of the witness,* the evidence of such witness shall be given in such a manner *that the witness would not be visible to the accused and his counsel and further if the witness fears that his voice may be recognized, his evidence shall be given in such manner that he would not be heard by the accused and his counsel.*
>
> (4) The evidence given by the witness under subsection (3) shall be given to the accused and his counsel, provided that the Court shall cause the evidence leading to the identity of the witness to be concealed.
>
> (5) The Court shall disallow any question by the accused or his counsel to any other witness that would lead to the identification of the witness who has given his evidence under this section.
>
> (6) *Where a witness gives evidence in accordance with this section, he shall, for the purposes of this Code and the Evidence Act, be deemed to be giving evidence in the presence of the Court, the accused person, and his counsel.*
>
> (7) The Court shall seal all records that may lead to the identification of the witness who has given evidence under this section. (emphasis added)

[25] Section 265A of the CPC is unambiguous in that the granting of the said application is not a matter of right of the witness. The court shall conduct an inquiry to determine whether the witness's identity needs to be protected. Upon the satisfaction of the court, then only the application may be granted as provided under s. 265A (2) and (3). Further, when a witness gives evidence in accordance with this section, he, for the purpose of the CPC and the Evidence Act 1950, is deemed to be giving evidence in the presence of the court, the accused, and his counsel as provided under s. 265A(6) of the same Code.

[26] In the present case, the procedure under s. 265A of the CPC had been strictly complied with by the trial judge. Upon an inquiry held on 10 June 2021, the trial judge was satisfied that there was a need to protect the identity of PW15 and PW16. As such, the applications by PW15 and PW16 were granted under s. 265A of the CPC and also pursuant to s. 20(1)(a) and (b) of the Witness Protection Act 2009. This is reflected in the record of appeal volume 2, encl. 6, p. 108, where the trial judge states:

> Hasil siasatan atau inkuiri yang dijalankan pada 10 Jun 2021, saya berpendapat adanya keperluan untuk identiti kedua-dua saksi terlindung ini dilindungi sebagaimana kehendak seksyen 20(1)(a) dan (b) Akta Perlindungan Saksi 2009 dan seksyen 265A Kanun Acara Jenayah.

[27] This special provision of s. 265A of the CPC mandates that the inquiry by the trial judge be held without the presence or participation of the accused and his counsel, as the objective is for the trial judge to determine whether the identity of a witness should or should not be disclosed. Otherwise, it defeats the purpose of the provision if the identity of a witness is disclosed at the inquiry stage to the other party. Even if the identity of the witness is already known to the accused or any other person, it does not mean that s. 265A is inapplicable. The protection of a witness must be assessed holistically, and under the law, that responsibility is given to the trial judge to determine.

[28] The intention of Parliament in enacting s. 265A is clear that is, to protect the safety of witnesses by not disclosing their identity, and at the same time, encourage witnesses to testify in court for any offence. This is reflected in the speech by the Minister in the Prime Minister's Department, Puan Hajjah Nancy binti Shukri, in Parliament on 17 May 2016 and reported in Hansard as follows:

> Fasal 7 bertujuan untuk memasukkan seksyen baru 265A, 265B dan 265C. Seksyen baru ini mengadakan peruntukan bagi saksi yang dilindungi diambil melalui tatacara khas. Pindaan ini dicadangkan bagi *menangani masalah keengganan saksi untuk memberi keterangan di mahkamah kerana bimbang keselamatan dirinya jika identitinya didedahkan terutamanya dalam kes-kes yang melibatkan kumpulan jenayah terancang.* Dengan peruntukan baru yang dicadangkan itu *akan lebih ramai saksi berani untuk tampil memberikan*

A *keterangan terhadap apa-apa pertuduhan di mahkamah termasuklah terhadap anggota kumpulan jenayah terancang* dan dengan keterangan itu, maka sabitan dapat dikenakan terhadap mereka yang melakukan jenayah.
(emphasis added)

[29] Reverting to the present case, the trial judge who has conducted the
B inquiry under s. 265A(3) was satisfied that there was a need for the identity of both PW15 and PW16 not to be disclosed and their evidence to be taken in the manner as prescribed therein.

[30] In the circumstances, we find that the invocation of s. 265A by the trial judge in the present case was in accordance with the law.

C

[31] On this issue, it is also trite that the principle of natural justice means the right to be heard and the right to an unbiased decision-maker (see *Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Applications* [2021] 1 CLJ 631, *Sabah Forest Industries Sdn Bhd v. UNP Plywood Sdn Bhd* [2010] 3 CLJ 779; and *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019]
D 5 CLJ 479).

[32] However, under s. 265A (2) and (3), there is no right for the accused to be heard at the inquiry stage, which is only to determine whether the prosecution's witness needs to be protected by not revealing their identity.
E The law expressly provides that the inquiry is to be held without the presence of the accused and his counsel. As there is a specific law that authorises the non-presence of the accused or his counsel at this inquiry stage, the issue of natural justice for the denial of the right to be heard does not arise.

[33] This court in *Bird Dominic Jude v. PP* [2014] 4 CLJ 133 has touched
F on this principle of law in the following manner:

[16] As regards the appellant's contention on the unconstitutionality of s. 56A of the CJA, which allows the prosecution to effect his arrest and subsequent detention after his acquittal by the High Court and thereby violating his constitutional rights as guaranteed by arts. 5(1) and 8(1) of
G the FC, with respect, *we could not agree with such a contention. On this issue, the question is whether there is a specific law authorising such deprivation of the applicant's personal liberties (See the case of In Re Mohamad Ezam Mohd Nor [2002] 5 CLJ 156; [2001] 3 MLJ 372). It is also to be noted that art. 5(1) of the FC provides as follows:*

No person shall be deprived of his life or personal liberty save in accordance with
H *law.* (emphasis added)

(see also *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147).

[34] Next, it is also a trite law that the duty of the court is to implement the law as intended by Parliament through the wording of the law. Whether
I the law is harsh or oppressive is to be discussed and resolved in Parliament and not for the court's determination, as this involves policy decisions and other considerations by the Legislature.

[35] In *Loh Kooi Choon v. Government Of Malaysia* [1975] CLJU 90; [1975] 1 LNS 90; [1977] 2 MLJ 187, Raja Azlan Shah (as His Highness then was) said this:

> *The question whether the impugned Act is 'harsh' or 'unjust' is a question of policy to be debated and decided by Parliament, and therefore not met for judicial determination*. To sustain it would cut very deeply into the very being of Parliament. (emphasis added)

[36] This court in *PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82, further explained as follows:

> The words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd v. Sirs*, seem to me to be particularly apt, *for the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention, what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous, it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.* (emphasis added)

[37] Therefore, the submission by counsel for the appellant that the provision of s. 265A of the CPC is oppressive and unreasonable is untenable.

[38] Counsel for the appellant also submitted that the trial judge had failed to provide any reasons for allowing the applications by PW15 and PW16 under s. 265A of the CPC.

[39] In this regard, the provision of s. 265A (2) only requires the trial judge to conduct the inquiry to determine whether the witness or witnesses need to be protected. The decision to protect the witness depends on the satisfaction of the trial judge at the conclusion of the inquiry, as provided under s. 265A(3). There is no duty or requirement under s. 265A for the trial judge to give any reasons, whether written or oral, before invoking the provision. This is more so as in an application under s. 265A, the trial judge needs to determine whether the witness should be protected, and his identity should or should not be disclosed. The information gathered by the trial judge, including the reason for allowing the application, must also not be disclosed. Any reasons given by the trial judge on the decision of the inquiry to the other party, directly or indirectly, may compromise the identity of the protected witness.

The Constitutionality Of Section 265A(2) And (3) Of The CPC

[40] The other related issue here is whether the provision of ss. 265A(2) and (3) are unconstitutional. In the present case, the appellant has challenged the constitutionality of s. 265A(2) and (3) on the ground that the appellant and his counsel were denied the right to be heard at the inquiry stage, and this breached art. 5(1) and 8(1) of the Federal Constitution.

[41] It is a settled principle of law that there is a strong presumption of constitutionality of a law, and the burden of proof is on the party seeking to establish the contrary.

(See *PP v. Datuk Harun Hj Idris & Ors* [1976] CLJU 180; [1976] 1 LNS 180; [1976] 2 MLJ 116; *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105 and *PP v. Pung Chen Choon* [1994] CLJU 208; [1994] 1 LNS 208; [1994] 1 MLJ 566).

[42] As regards art. 5(1) of the Federal Constitution, which states "No person shall be deprived of his life or personal liberty save in accordance with law", it is a trite principle of law that this right is not absolute. The right as enshrined in art. 5(1) can be taken away by any provision of the law consistent with the phrase "save in accordance with law" therein.

[43] There is a plethora of cases that have discussed this principle of law, and one of the cases on point is this court decision in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105. In this case, the challenge was made, among others, against s. 59 of the Immigration Act 1959/63, which excludes the right to be heard, particularly on matters relating to the cancellation and revocation of an entry permit. It was argued that this provision is unlawful and unconstitutional as it infringed arts. 5 and 8 of the Federal Constitution.

Section 59 states as follows:

> **No person and no member of a class of persons shall be given an opportunity of being heard** before the Minister or the Director General, or, in the case of an East Malaysian State, makes any order against him in respect of any matter under this Act or any subsidiary legislation made under the Act. (emphasis added)

[44] In rejecting the challenge to the constitutionality of s. 59, this court said this:

> It is clear from the authorities that the constitutional rights as guaranteed under art. 5(1) of the Federal Constitution can be taken away in accordance with the law. **Hence, s. 59 of the Act, which removes the *audi alterem partem* rule, which was duly enacted by Parliament, is valid and constitutional.** (emphasis added)

[45] In *Letitia Bosman v. PP & Other Appeals* (*supra*), the principle of law is further emphasised as follows:

> [132] The position in law on this matter is now well-settled. That **the constitutional rights as guaranteed under cl. (1) of art. 5 can be taken away in accordance with law** has been authoritatively established by a line of our authorities. In other words, a law that provides for the deprivation of a person's life or personal liberty is valid and binding as long **as it is validly passed by parliament.** (emphasis added)

(See also *Government Of Malaysia & Anor v. Selangor Pilot Association* [1977] 1 CLJU 28; [1977] 1 LNS 28; [1977] 1 MLJ 133; *Bird Dominic Jude v. PP* (*supra*); and *PP v. Yee Kim Seng* [1983] 1 CLJ 38; [1983] CLJ (Rep) 824).

[46] Reverting to the present case, s. 265A of the CPC, in particular sub-ss. 265A(2) and (3), was validly passed by Parliament with plain and unambiguous provisions that authorise the absence of the accused and his counsel at the inquiry stage. Therefore, it is valid and constitutional.

[47] Next, art. 8(1) of the Federal Constitution states, "All persons are equal before the law and entitled to equal protection of the law." In the present case, s. 265A of the CPC applies to any prosecution's witnesses in a criminal trial who wish to be protected by not disclosing their identity. There is no element of discrimination in the application of the provision. Hence, as this provision is available to any prosecution's witnesses in a criminal trial, it is not discriminatory in nature, and does not infringe art. 8(1) of the Federal Constitution.

[48] The same issue has been explained by this court in *Bird Dominic Jude*'s case (*supra*), in the following manner:

> [19] In the present case, **it is our finding that s. 56A of the CJA applies to everybody,** whether a citizen or not. As long as an accused person is acquitted at the High Court, the Public Prosecutor can apply for a warrant under s. 56A of the CJA. Section 56A of the CJA, **in our view, is not discriminatory in nature. On the test as to whether the provision of a statute is discriminatory in nature,** we would refer to the case of *Datuk Haji Harun Haji Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155, where Suffian LP had this to say:
>
> > With respect, we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be – **if the law is not discriminatory, if, for instance, it obviously applies to everybody, it is good law** ... (emphasis added)

[49] In addition, we reiterate that the purpose of s. 265A is for the trial judge to determine whether a witness or witnesses, and in this case, PW15 and PW16, to be protected by not disclosing their identity. The inquiry process by the trial judge does not affect the rights of an accused person to defend himself, nor touches on his guilt. The evidence of PW15 and PW16 was also presented to the defence, and these witnesses were also subjected to cross-examination by the defence. There is no miscarriage of justice or prejudicial effect to the appellant. All the steps taken in the present case were in accordance with the law, and arts. 5(1) and 8(1) have not been breached.

[50] Based on the reasoning and authorities cited, we find s. 265A(2) and (3) of the CPC to be a good law, valid, and constitutional.

A **The Issue Of Non-compliance With Section 182A Of The CPC**

[51] Next is the issue of failure to consider the appellant's s. 112 statement (D107) and whether there was a non-compliance with s. 182A of the CPC. Section 182A states:

B 182A (1) At the conclusion of the trial, **the Court shall consider all the evidence adduced before it** and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

C

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal. (emphasis added)

[52] Section 182A(1) requires the court to consider all the evidence D adduced before it at the close of a trial in deciding whether the prosecution has proved its case beyond a reasonable doubt. In the appellant's s. 112 statement (D107), the appellant's defence essentially was that the appellant did not rape PW15, and PW15 invented the story as an excuse to return home to Indonesia. Further, in D107, it stated that this could be a political E ploy. Here, it is not disputed that the main contents of D107 were regurgitated in the appellant's oral evidence when he presented his defence before the court. Hence, when the court has considered his defence made orally at the close of the trial, the court had considered all the evidence adduced before it. It was not the submission of the defence that the contents of D107 are different from the appellant's oral evidence in court. Therefore, F there is no breach of s. 182A in the present case.

[53] Furthermore, the appellant's defence in D107 is an exculpatory or self-serving statement, which, in itself, is not evidence of facts. The evidence of facts is the oral evidence of the appellant in court, which has been tested by cross-examination. This court in *PP v. Mansor Md Rashid & Anor* [1997] G 1 CLJ 233; [1996] 3 MLJ 560 explained the principle as follows:

With respect, we are of the view that the approach was wrong. **A purely exculpatory or self-serving statement is not evidence of the facts stated,** though it may be admitted to show the reaction or attitude of the accused at the time when he made it. And in considering whether there is a case H to answer, **a trial judge ought not take into account such a statement as the basis for founding an order of acquittal and discharge.**

(emphasis added)

[54] Next, in *PP v. Adetunji Adeleye Sule* [1993] 3 CLJ 113; [1993] 2 MLJ 70, Edgar Joseph Jr SCJ, also touched on the same issue in the following I manner:

> In the same way, in a case where the *onus* lies on the accused to rebut a statutory presumption, a voluntary out of court statement by the accused and this include a cautioned statement – *which is wholly exculpatory should not be made the foundation of an order of acquittal especially at the close of the case for prosecution, since at that stage, the accused not having given evidence himself, his explanation could not be tested by cross-examination.*
>
> (emphasis added)

[55] Likewise, in the case of *PP v. Chan Kim Choi* [1988] CLJU 221; [1988] 1 LNS 221; [1989] 1 MLJ 404 where the court said this:

> Such statements, when given in accordance with s. 122(6) of the Criminal Procedure Code, may be admitted as part of the prosecution's evidence, but not as to the truth of the contents thereof. They are admissible on the ground, as the Privy Council has put it, that 'common fairness requires that the entirety of the statement should be admitted so as to show the precise context in which the admission was made'.... *What he says in order to exculpate himself cannot be admissible as the truth because it is self-serving and also because it is not necessarily consistent with other facts that may be established by the prosecution in the course of the trial.* Accordingly, we are not prepared to accept, in a submission of no case to answer, the contention of counsel for the defence that the explanations given by the accused in his cautioned statement were true. (emphasis added)

[56] Thus, what is pertinent for the court to consider is the appellant's evidence in court as his defence, which was tested in cross-examination and in the light of the totality evidence. After all, the substance of the appellant's s. 112 statement (D107) was similar to his oral evidence in court. Hence, there was no miscarriage of justice or prejudicial effect to the appellant in the circumstances. The requirement of s. 182A of the CPC has been complied with, and the omission to refer to the appellant's s. 112 statement (D107) by the court is not fatal to the prosecution's case.

[57] On the same issue, we agree with the decision of this court in *Sathya Vello v. PP* [2022] 5 CLJ 659; [2022] 4 MLJ 111, which states as follows:

> There was no merit to the appellant's contention that the trial judge had failed to consider all the evidence in breach of s. 182A of the CPC. *Although the trial judge had not considered the appellant's cautioned statement, it was in substance similar to the appellant's evidence in court. Hence, the mere omission to refer to the cautioned statement in the judgment was not fatal and did not vitiate the conviction as the cautioned statement added nothing further to the accused's evidence in court.* (emphasis added)

[58] We noted that another panel of this court has reviewed the decision in *Sathya Vello*, but the review panel issued no grounds of judgment. Be that as it may, as discussed earlier, this panel agrees with the principle of law enunciated in *Sathya Vello* on this issue.

[59] In addition, it is trite that an appeal is a continuation of a hearing, and an appellate court can review the whole evidence and make a finding even on an issue not decided by the trial judge. Thus, the appellate court in the present case can evaluate all the evidence adduced and make a finding whether s. 182A has been complied with, even though the appellant's 112 statement was not mentioned in the trial judge's grounds of judgment.

[60] This court in *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613 explained this principle of law as follows:

> [20] As regards the first main ground of appeal raised by the appellant, I am of the view that *the Court of Appeal has the power to review or to re-evaluate all the evidence* available as adduced by the prosecution. *The Court of Appeal is in the position to do so in the present case, even though the grounds of decision of the trial judge, as appearing in the appeal records, is found lacking in specific findings and with no reason for the finding.* In a case involving purely question of fact, the Court of Appeal is free to determine whether or not various findings of the trial court are correct (see *Mohamed Mokhtar v. Public Prosecutor* [1972] 1 MLJ 122). In the present case, even though the Court of Appeal took the view that the High Court judgment was of no assistance, it nevertheless had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and how it had implicated the accused. *There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on the evidence adduced from the witnesses called by the prosecution as appearing in the appeal records.* I am therefore of the view that the Court of Appeal did not err on this issue. (emphasis added)

[61] Likewise, in the present case, the re-evaluation of evidence by the appellate court on all the evidence in the records of appeal disclosed that at the end of the case, all the evidence had been considered by the trial judge, even without mentioning the appellant's 112 statement (D107) in his grounds of judgment. Here, the Court of Appeal found that s. 182A has been complied with, and we agree with the findings of both the trial judge and the majority of the Court of Appeal.

The Credibility Of PW15

[62] Regarding the credibility of PW15, it is also a settled principle of law that the credibility of a witness is best assessed by the trial judge who has the audio-visual advantage and is able to observe the demeanour of a witness. Unless the finding on the credibility is plainly wrong and not supported by evidence, the appellate court should be slow in disturbing the finding. Further, it is trite that it is not the function of an appellate court to make primary findings of fact. Discrepancies in the evidence of a witness, if not material, should not affect the witness's credibility.

[63] This court in *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1 has succinctly discussed this issue on the credibility of a witness as follows:

> [9] The approach to be taken by an appellate court when dealing with a trial court's assessment of the credibility of a witness is well-established by high authorities. *The credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such findings of fact arrived at by the judge who had audio-visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing with the finding. Discrepancies will always be found in the evidence of a witness, but what a judge has to determine is whether they are minor or material discrepancies. It would be wrong to say just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. In the final analysis, it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject.* (emphasis added)

(see also *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; *Md Zainuddin Raujan v. PP* [2012] 7 CLJ 715; [2013] 4 MLJ 596).

[64] In the present case, the trial judge found that PW15 was a credible witness based on the assessment of her demeanour, her conduct, and tested it against the totality of corroborative evidence before the court. There were also concurrent findings on the credibility of PW15 by the trial judge and the majority of the Court of Appeal. Further, the contradictions of PW15's evidence or her conduct raised by the defence were not material that affect PW15's credibility. As such, there is no reason for this court to disturb the said findings.

[65] In assessing the credibility of PW15, the trial judge not only took into consideration that PW15's evidence was not shaken during cross-examination but also considered other evidence before the court that enhanced PW15's credibility, including corroborative evidence.

[66] On this issue, counsel for the appellant submitted that PW15's conduct after the incident does not reflect the conduct of a rape victim. PW15's conduct, including cleaning herself in the bathroom, mopping the said appellant's semen, washing the mop, and looking calm when she met PW6, PW7, and PW23, was submitted, is not the conduct of a victim who has been raped.

[67] In this regard, PW15's conduct has to be analysed in the context of the totality of evidence. Firstly, PW15 testified that earlier, she had been warned by the appellant that PW15 must not inform the appellant's wife (DW2) about his misconduct against PW15, or if not, they would die and PW15 would die first. Further, PW15's conducts when she telephones PW3 thrice in a state of panic and crying, informing him about the rape incidents, and crying when informed PW16 before lodging the police report, supported the conduct of a rape victim. The forensic evidence by PW5 also shows fresh tears of her hymen that are consistent with PW15's story of being raped.

[68] Next, the issue of the unexplained landline from which PW15 made the three calls to PW3 was raised by the defence. It was contended that the calls were not from the landline of the appellant's house, as testified by PW15. We find that this contradiction is not material, having considered the totality of the evidence. The material evidence here was the content of the calls, and PW3 actually received the three calls. Thus, the said contradiction does not affect PW15's credibility.

[69] Counsel for the appellant further raised the issue that PW15 did not inform her mother about the rape when she met her at the Indonesian Embassy two months after the incident. However, this has been explained in her re-examination, when she said that she did not inform her mother because she felt guilty and did not want her mother to be worried. In her words, PW15 said this, "saya rasa bersalah dan saya takut ibu saya khuatir". The explanation is reasonable and not something inherently incredible.

[70] Counsel for the appellant also raised the issue that no DNA of the appellant was found on the mop that was used to mop the appellant's semen in the said room. The evidence before the court was that PW15 had mopped the sticky liquid found on the floor after the incident with a mop that was already soaked with soap. The existence or non-existence of the appellant's DNA on the said mop is subject to various factors that could not be conclusively determined by the forensic expert. In any event, the DNA evidence is only corroborative in nature and would not affect the prosecution's case if there is sufficient evidence to prove the element of the offence beyond a reasonable doubt. We are also of the view that the non-existence of the appellant's DNA on the mop does not affect PW15's credibility, in the light of the totality of evidence.

[71] The corroborative nature of DNA evidence has been explained, among others, in the case of *Ng Mee Yee & Anor v. PP* [2025] 6 CLJ 343; *Lingeswaran Ambalakhan v. PP* [2025] CLJU 1473; *Francis Abuchi Odike v. PP* [2015] CLJU 928; [2015] 1 LNS 928 and *Lee Gee Hian v. PP* [2021] CLJU 1895; [2021] 1 LNS 1895.

[72] In the circumstances, we find no reason for this court to disturb the findings of the trial judge and the majority of the Court of Appeal in their findings on the credibility of PW15.

The Corroboration Of PW15's Evidence

[73] The next pertinent issue raised in the present case is the corroboration of PW15's evidence. It was submitted by counsel for the appellant that PW15's evidence was not corroborated by any independent evidence, and PW15's evidence itself is not credible. Therefore, the findings by the trial judge and the majority of the Court of Appeal that PW15's evidence was corroborated by other evidence are an appealable error.

[74] It is a trite law that the corroborative evidence must itself be credible. The essence of corroborative evidence, among others, is that one credible witness confirms another credible witness, which will provide credible evidence.

(See *Yap Ee Kong & Anor v. PP* [1980] CLJU 117; [1980] 1 LNS 117; [1981] 1 MLJ 144; *TN Nathan v. PP* [1977] CLJU 127; [1977] 1 LNS 127; [1978] 1 MLJ 134 and *DPP v. Kilbourne* [1973] 1 All ER 440).

[75] However, corroborative evidence is not restricted to oral evidence of an independent witness only, but also by established facts as explained in the case of *Brabakaran v. PP* [1965] CLJU 12; [1965] 1 LNS 12; [1966] MLJ 64 as follows:

> Corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. *Corroboration can equally well be afforded by established facts, and the logic of established facts sometimes speaks even more eloquently than words.* (emphasis added)

[76] Circumstantial evidence can also amount to corroboration if the circumstantial evidence is credible and supports the evidence of another witness. In *Tang Kin Seng v. PP* [1996] 3 SLR(R) 444, Yong Pung How CJ quoted the case of *R v. Hills* [1988] 86 Cr App R 26, which states:

> 55 … *Corroboration is not infrequently provided by a combination of pieces of circumstantial evidence,* each innocuous on its own, which together tend to show that the defendant committed the crime. For example, in a rape case, where the defendant denies he ever had sexual intercourse with the complainant, it may be possible to prove (1) *by medical evidence that she had had sexual intercourse within an hour or so prior to the medical examination, (2) by other independent evidence that the defendant and no other man had been with her during that time, (3) that her underclothing was torn and that she had injuries to her private parts.* None of these items of evidence on their own would be sufficient to provide the necessary corroboration, but the judge would be entitled to direct the jury that if they were satisfied so as to feel sure that each of those three items would had been proved, the combined effect of the three items *would be capable of corroborating the girl's evidence.* (emphasis added)

Chief Justice Yong Pung How further commented as follows:

> [56] This is but common sense. The only surprise is that it took so long for it to be recognized. **If a conviction for an offence can be secured solely on circumstantial evidence, there is no reason at all why corroboration cannot also be based purely on circumstantial evidence.** The contrary position would lead to the absurdity that the prosecution's case is stronger if the victim is unable to give evidence. (emphasis added)

(See also *Attan Abdul Gani v. PP* [1969] CLJU 12; [1969] 1 LNS 12; [1970] 2 MLJ 143b).

[77] In a sexual offence case, such as a rape offence, although there is no legal requirement for corroborating evidence, it is prudent to have corroborative evidence supporting the evidence of the victim. The corroboration will enhance the credibility of the victim and assist in the establishment of the prosecution's case beyond a reasonable doubt. (See also *Din v. PP* [1964] CLJU 33; [1964] 1 LNS 33; [1964] MLJ 300).

[78] In the present case, besides there were concurrent findings that PW15's evidence is credible, there is ample corroborative evidence supporting PW15's evidence.

[79] A day after the incident, PW15, on 8 July 2019 at about 11am, made a phone call to Riki Sapari (PW3), an employee with "Bahagian Tenaga Kerja KBRI", asking him to rescue her as she had been raped by her employer. During the call, she was crying and sounded panic and repeatedly said "tolong selamatkan saya" (please save me). She called PW3 three times, where she asked to be rescued, and PW3 then informed her to go to the nearest police station.

[80] Next, PW16 (protected witness) testified that on 8 July 2019 at about 1.15pm, PW16 was on the way home driving a car when PW15, who was at the side of the road, waved at him. When PW16 stopped the car, he saw PW15 running to the car and then asked PW16 to send her to the Indonesian Embassy in Kuala Lumpur. PW16 then offered to send her to the taxi stand at Amanjaya Bus Station. Thereafter, PW15 informed PW16 that she had been raped by her employer and started crying. PW16 then brought her to the Jelapang Police Station to lodge a police report.

[81] The defence witness, Mohamad Rusdi (DW3), further corroborates PW15's evidence when DW3 testified that after the incident, PW15 told him, while crying, that she wanted to go back to Indonesia as there were "bad people" at her place.

[82] The evidence by PW3, PW16, and DW3 showed that PW15 was in a state of distress when she telephoned PW3 thrice, when PW16 met her and later brought her to the police station, and when she met DW3. This evidence of distress amounts to corroboration of PW15's evidence that she has been raped.

[83] In the *Tang Kin Seng* case (*supra*), the court acknowledged that evidence of distress amounts to corroboration. The court made the following observations:

> 88 The same applies for evidence of distress. In *R v. Redpath* (1962) 46 Cr App R 319, it was held that in certain circumstances, *evidence of distress may amount to corroboration.* In that case, the appellant was seen by a complete stranger to have approached a child and later driving off in a car. The child was observed to be in a very distressed condition shortly afterwards. The child did not know that she was being observed. *Lord Parker CJ held that in those circumstances, the child's distress could amount to corroboration.*

…

90 *R v. Ramesh Chauhan* (1981) 73 Cr App R 232 is a case falling between the two extremes, and thus useful. In that case, the accused was left alone in an office with the complainant. *The complainant was seen by a colleague running out of the office into the toilet, crying and in an upset state. The colleague followed the complainant in, whereupon the complainant made an immediate complaint to her that she had been molested by the accused.* The accused gave evidence that nothing happened in the room and that when the complainant left the room, she appeared normal. The prosecution thought that there was no corroboration, but *the recorder disagreed and directed the jury that the distressed state of the complainant could amount to corroboration if they thought that the distress was not feigned and that the complainant was not imagining things. The Court of Appeal held that the recorder was right.*

91 Provided that the pitfalls are kept in mind, *there is no reason why the complainant's distress cannot be a weighty piece of evidence in the right circumstances.*
… (emphasis added)

[84] Likewise, in the present case, the evidence of PW3, who received three phone calls from PW15 during which she was panicked and crying, and informed him that she had been raped, the evidence of PW16, who saw PW15 waving and running after PW16's car, and later cried when she informed him that she had been raped, and the evidence of DW3 that PW15 while crying informed him that there was 'bad people' at her work place, were evidence of distress that corroborated PW15's evidence.

[85] Next, PW15 lodged a police report (P52) on 8 July 2019, at about 2.12pm, and the substance of the report was that she was raped by the appellant on 7 July 2019 at about 9pm.

[86] Exhibit P52 is PW15's former statement made to the police, an authority legally competent to investigate the facts. It has a corroborative nature in light of other evidence adduced in the present case. Section 157 of the Evidence Act 1950 states:

> **In order to corroborate the testimony of a witness, any former statement made by him,** whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or **before any authority legally competent to investigate the fact,** may be proved. (emphasis added)

[87] This court in *Lim Guan Eng v. PP* [2000] 2 CLJ 541; [2000] 2 MLJ 577, has explained the application of s. 157 as follows:

> It is our view that *under s. 157, a former statement made by a witness is admissible in order to corroborate his testimony.* The weight of such a statement for the purpose of corroboration depends on the facts of a particular case. This view is supported by a long line of decided cases. In *Liew Wah Ming v. PP* [1963] 2 MLJ 82, Thompson CJ, said at p 84:
>
> *Section 157 is clear and unambiguous, and there can be no doubt that in the circumstances laid down in that section, a former statement made by a witness is admissible to corroborate his testimony and with the object of showing consistency.*

> *But the weight or value of such a statement as corroboration must always be a question of fact* … While, therefore, the former statement of an accomplice or … of a child is admissible to corroborate his testimony and to indicate consistency, the weight to be attached to it must vary with the facts of each case. (emphasis added)

(see also *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1974] CLJU 61; [1974] 1 LNS 61; [1975] 1 MLJ 119; *PP v. Samsul Kamar Mohd Zain* [1988] 1 CLJ 542; [1988] 2 CLJ (Rep) 310; [1988] 2 MLJ 252; and *Rex v. Velayuthan* [1935] CLJU 81; [1935] 1 LNS 81; [1935] MLJ 277).

[88] Reverting to the present case, P52 was lodged by PW15 a day after the incident, and its contents are consistent with her testimony that she was raped by the appellant in the house on 7 July 2019. There is also other oral and documentary evidence that corroborates PW15's evidence in relation to the rape incident. Thus, P52 is in fact a piece of corroborative evidence in this case.

[89] Apart from this, in PW15's personal diary (P20A), PW15, among others, wrote "Aku benci diriku" (I hate myself), and when asked in court what she meant by these words, PW15 said that she feels "kotor, jijik dan hina" (dirty, disgusting, and humiliated). This is also evidence of distress that corroborates PW15's evidence, and P20A is her former statement that is consistent with the feelings of a rape victim. In the *Lim Guan Eng* case (*supra*), Corporal Stanley typed a written note about the appellant's speech (P6), and this written note was also accepted as corroborative evidence under s. 157 of the Evidence Act 1950.

[90] Further, there was also the evidence from the CCTV presented by the prosecution. The CCTV showed that at the material time when the incident happened, the appellant's wife (SD2) and their son, Bryan, went out to McDonald's, and the appellant's friend, Leong Yeong Wai (PW22), had left the house earlier than SD2. Thus, the appellant was alone in the house with PW15, and this provides the opportunity for the appellant to commit the offence.

[91] On this issue, we noted that evidence of opportunity *per se* cannot amount to corroboration of PW15, but with other circumstantial evidence, as available in the present case, it would lead to a reasonable inference that the offence had happened as testified by PW15. In *Ridley v. Whipp* [1916] 22 CLR 381, Griffith CJ explained:

> In the case of *Dawson v. M, Kenzie* (1908) SC 698, the Court of Sessions in Scotland held that the proof of opportunity of intercourse may be corroborative evidence if of such character as to establish suspicion. *In my opinion, when reliance is placed upon proof of opportunity, that proof must be supplemented by proof of circumstances of such a nature as to lead to the inference that it was probable that advantage would be taken of the opportunity.* It is impossible to define in advance what circumstantial evidence would be sufficient for that purpose. (emphasis added)

[92] In the present case, besides other corroborative evidence, there is also admissible medical evidence of PW5 that corroborates the evidence of the offence of rape against PW15.

[93] The medical evidence adduced in the present case was given by Dr Nila Wati (PW5). On 9 July 2019, PW5 examined PW15 at Ipoh General Hospital and found that there were fresh tears at 6 to 8 o'clock of the hymen and also abrasions at 2 o'clock which occurred less than 72 hours from the time of the examination. PW5 also did not rule out that the tears could be caused by penile penetration. This piece of medical evidence corroborates the evidence of PW15 that she was raped two days before the medical examination by PW5. Medical evidence corroborates that the evidence of rape victims has been acknowledged in a plethora of cases, such as in *Tan Kin Seng v. PP* (*supra*) and *Augustine Foong Boo Jang v. PP* [1989] CLJU 107; [1989] 1 LNS 107; [1990] 1 MLJ 225.

[94] Counsel for the appellant submitted that if it is true that the appellant was left alone with PW15, it was only for about 10 to 13 minutes, and it is incredulous that the appellant would run the risk of being caught for raping PW15, knowing that his wife could return from McDonald's. Be that as it may, the actual incident of rape is possible to happen within the duration of 10 to 13 minutes, in light of the incident that was relayed by PW15 in this case. Moreover, as testified by PW15, the appellant had sexually harassed her a few times in the appellant's house before. The rape incident on 7 July 2019 was not the appellant's first sexual misconduct against PW15.

[95] In the circumstances, we agree with the concurrent findings of the High Court and the majority of the Court of Appeal that PW15's evidence was sufficiently corroborated by other evidence mentioned earlier.

The Consideration Of The Appellant's Defence

[96] Having read the notes of proceedings and the grounds of judgment of the trial judge from pp. 66 to 100 and pp. 4 to 6 of the majority of the Court of Appeal, we find that the appellant's defence has been sufficiently considered by the trial judge and the majority of the Court of Appeal. The trial judge has considered in detail the defence put forth by the appellant as reflected in paras. [106] to [111] of the grounds of judgment, and also the defence's witness, SD2, as mentioned in para. [112] of the grounds of judgment. Further, the trial judge has analysed the defence in light of the totality of evidence as reflected in paras. [113] to [126] of the grounds of judgment. The trial judge also ruled out that PW15 invented the story to enable her to return to Indonesia, or the existence of a political ploy. Thereafter, the trial judge concluded that the appellant's defence was an afterthought and failed to raise a reasonable doubt on the prosecution's case.

[97] The majority of the Court of Appeal has also assessed the defence's case in its grounds of judgment at paras. [10] to [12] and [29] to [36], and thereafter, concluded that the conviction by the trial judge is safe and, as such, affirmed the conviction.

[98] On the same issue, there were concurrent findings of the trial judge and the majority of the Court of Appeal that the appellant had failed in his defence to raise a reasonable doubt on the prosecution's case. We agree with these findings as the defence has failed to answer the evidence presented by the prosecution. It is trite that a credible defence, among others, is a defence that answers the evidence of the prosecution.

(See also *Krishna Rao Gurumurthi v. PP & Another Appeal* [2009] 2 CLJ 603; *Amathevelli P Ramasamy v. PP* [2009] 3 CLJ 109; *Azhar Lazim v. PP* [2012] CLJU 262; [2012] 1 LNS 262).

[99] In the present case, the appellant's defence, which includes the appellant's testimony and other defence witnesses, does not raise a reasonable doubt as to the truth of the prosecution's evidence or the accused's guilt.

The Shoddy And Incomplete Investigation

[100] Based on the totality of evidence presented to the court, and the analysis discussed earlier, we agree with the concurrent findings of the trial judge and the majority of the Court of Appeal that the elements of the charge under s. 376(1) of the Penal Code against the appellant, that there was penetration and without PW15's consent, have been proven beyond a reasonable doubt. Therefore, the submission that the investigations by PW23 were shoddy and incomplete under the circumstances is untenable.

The Admission Of Additional Evidence

[101] On the issue of the admission of the additional evidence, the defence called an Indonesian lawyer, Pathurrahman (SDT1), who testified that PW15 had come to his office on 20 May 2024 for legal advice. PW15 then informed him that her evidence in the rape trial against the appellant was not true, and PW15 which to retract her evidence. PW15 has concocted the evidence to enable her to return home to Indonesia before the expiry of her contract of service.

[102] Pathurrahman prepared a written statement (SDT1), which also contained a letter of statement of PW15 made by Pathurrahman, allegedly upon PW15's instruction. In the written statement (SDT1), it exhibited, among others, a letter of authorisation by PW15 to Pathurrahman (SDT1(D)). Both SDT1 and SDT1(D) were allegedly signed by PW15. In the letter of statement (SDT1), PW15 purportedly states, in substance, that her evidence in the trial against the appellant, that she was raped by the appellant, was not true, and she made up the story to enable her to return home to Indonesia before the expiry of her contract period.

[103] On this issue, first, a witness may testify on relevant facts based on his personal knowledge or perception and not of others. The rule against hearsay evidence has been codified in s. 60 of the Evidence Act 1950 and further explained in the landmark case of *Subramaniam v. PP* [1956] CLJU 115; [1956] 1 LNS 115; [1956] 1 MLJ 220, where it states:

> In ruling out peremptorily the evidence of conversation between the terrorists and the appellant, the trial judge was in error. *Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.* The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships, statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes.
>
> (emphasis added)

[104] For ease of reference, s. 60 of the Evidence Act 1950 is as follows:

> 60. (1) Oral evidence shall in all cases whatever be direct, that is to say –
>
> (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
>
> (b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
>
> (c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
>
> (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.
>
> (2) The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of the treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.
>
> (3) If oral evidence refers to the existence or condition of any material thing, including a document, the court may, if it thinks fit, require the production of that material thing or the document for its inspection.

[105] It is not disputed that the intention of the defence to put in the additional evidence, SDT1 and other related documents, is to prove the truth of the contents therein. Otherwise, it is meaningless to tender the statements to show that the statement was made to Pathurrahman and not the truth of its contents, which clearly would have no impact on the existing evidence presented during the trial. Pathurrahman has no personal knowledge of the rape incident that occurred on 7 July 2019 in Ipoh, Malaysia. Thus, his state of mind, in the circumstances of this case, has no evidential weight that can assist the court other than, if accepted, forwarding an alleged statement made by PW15 for the court's consideration.

[106] As the purpose of adducing the additional evidence in the present case is to prove the truth of the contents of the statements, it clearly amounts to documentary hearsay, and the oral evidence of Pathurrahman informing what PW15 had told him is also hearsay evidence, which is inadmissible.

(See *Subramaniam v. PP* [1956] CLJU 115; [1956] 1 LNS 115; [1956] 1 MLJ 220, *Teper v. The Queen* [1952] AC 480; *Raten v. R* [1972] 1 AC 378, *Myers v. DPP* [1964] 2 All ER 881; *Sim Tiew Bee v. PP* [1973] CLJU 138; [1973] 1 LNS 138; [1973] 2 MLJ 200; *Beh Heng Siong v. PP* [1972] CLJU 12; [1972] 1 LNS 12; [1972] 2 MLJ 190).

[107] In any event, our law provides exceptions to this hearsay evidence in s. 32(1) of the Evidence Act 1950. A statement of a person who is not called as a witness is admissible if the prerequisites of s. 32(1) are strictly proved. The prerequisites under s. 32(1) are where the maker is dead, the maker cannot be found, the maker is incapable of giving evidence, or the procuring of the maker's attendance will result in unreasonable delay or expense.

(See also *Sim Tiew Bee v. PP* [1973] CLJU 138; [1973] 1 LNS 138; [1973] 2 MLJ 200).

[108] The requirement to prove strictly the pre-requisite of s. 32(1) has been emphasised in the *Sim Tiew Bee* case (*supra*) as follows:

> In the case of *Chaincal Singh v. Emperor*, evidence given by a witness in a judicial proceeding was to be used under section 33 of the Indian Evidence Act in a subsequent judicial proceeding on the ground that the witness was incapable of giving evidence. It was held by Lord Goddard that:
>
> > Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, **that fact must be proved, and proved strictly**. … (emphasis added)

[109] Section 32(1) of the Evidence Act 1950 states:

> 32(1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be

procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

…

(c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, **if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;**

(emphasis added)

[110] In the present case, the defence is relying on the second limb of s. 32(1)(c), where the statement, if true, would expose PW15 to criminal prosecution.

[111] Having perused the evidence of Pathurrahman, the written statements (SDT1), and other related documents, there is nothing to establish the fact that PW15 refused to come to Malaysia to retract her evidence for the reason that she would be exposed to criminal prosecution. Pathurrahman, being a lawyer, could easily advise her on this, and to put the said reason in writing, if it was the true reason she refused to come to Malaysia. Pathurrahman, in his oral evidence, did not say anything about PW15 being afraid of being exposed to criminal prosecution in Malaysia for her conduct in retracting her evidence in the rape trial. Pathurrahman was also not asked by the defence on this pertinent reason when he testified in court before the trial judge in Malaysia. In the circumstances, we find that the prerequisites of s. 32(1)(c) have not been strictly proved.

[112] Further, on this issue of admission of new evidence, one of the main elements to be considered by the court is that the evidence sought to be admitted must be credible.

(See also *Mohamed Jamal v. PP* [1964] CLJU 235; [1964] 1 LNS 235; [1964] MLJ 254).

[113] Reverting to the present case, having considered the oral evidence and the documentary evidence adduced to support the admission of the additional evidence, the trial judge made a finding of fact that the contents of the statement (SDT1) were not credible on the following grounds:

(i) in SDT1, it states that PW15 had worked with the appellant from 7 May 2019 until May 2021, which was about two years. However, based on the oral and documentary evidence presented during the rape trial against the appellant, it was proven that PW15 only worked with the appellant for two months, that was from 8 May 2019 until 7 July 2019; and

A (ii) the alleged signature of PW15 on SDT1 and SDT1(D) compared with her signature on the documents tendered in court during the rape trial shows a striking difference. The signature on SDT1 and SDT1(D) was compared with P31 (Tawaran Pekerjaan) and P32B (Perakuan Pembantu Rumah Asing). As such, the trial judge made a finding of the possibility
B that the signature on SDT1 and SDT1(D) were not the signatures of PW15.

[114] Based on the evidence in the admission of additional evidence proceedings, the totality of evidence in the present case and the relevant laws as discussed earlier, we agree with the finding of the trial judge in not
C accepting the additional evidence, SDT1 and SDT(D), on the grounds of hearsay, not credible, and not having fulfilled the requirement of s. 32(1) of the Evidence Act 1950 for its admission as evidence.

Conclusion

D **[115]** In conclusion, it is our unanimous decision that the conviction against the appellant is safe and hereby affirmed. We also find that the sentence imposed by the majority of the Court of Appeal is also appropriate and affirmed the sentence. The appellant's appeal is hereby dismissed.

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